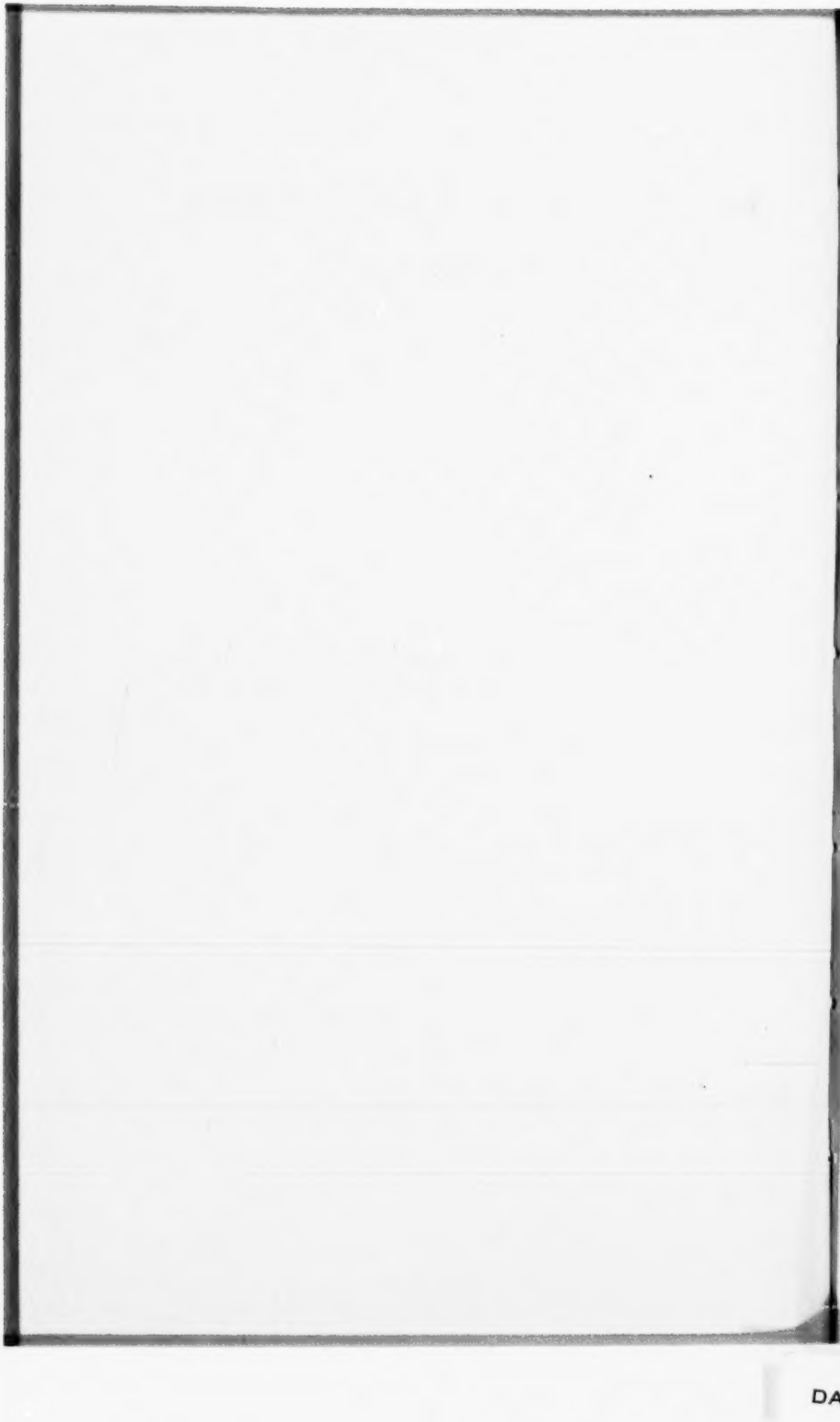

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 825

PERRY J. FISHMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 80-82)[1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 1957 (R. 83), and a petition for rehearing was denied on February 11, 1957 (R. 85-88). The petition for a writ of certiorari was filed on March 8, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] References designated "R." refer to the petitioner's appendix.

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	2
Argument	4
Conclusion	6

CITATIONS

CASES:

Abrams v. *United States*, 250 U.S. 616	5
Butler v. *United States*, 197 F. 2d 561	4
Curley v. *United States*, 160 F. 2d 229, certiorari denied, 331 U.S. 837	4
Girgenti v. *United States*, 81 F. 2d 741	4
Glasser v. *United States*, 315 U.S. 60	5
Holland v. *United States*, 348 U.S. 121	5
Schino v. *United States*, 209 F. 2d 67, certiorari denied, 347 U.S. 937	4
Stoppelli v. *United States*, 183 F. 2d 391, certiorari denied, 340 U.S. 864	4
Tenore v. *United States*, 207 F. 2d 565	4
United States v. *Falcone*, 311 U.S. 205	5
United States v. *Gerke*, 125 F. 2d 243, certiorari denied, 316 U.S. 667	4
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	4

STATUTE:

18 U.S.C. 371	2

QUESTION PRESENTED

Whether circumstantial evidence as to petitioner's participation in a conspiracy to violate federal liquor laws was sufficient to warrant his conviction.

STATUTE INVOLVED

18 U.S.C. 371 provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

STATEMENT

Petitioner and others were convicted by a jury in the United States District Court for the District of New Jersey of conspiracy to distill liquor in violation of the United States liquor laws (R. 1). Petitioner was sentenced to imprisonment for two years and six months (R. 2). On appeal, his conviction was unanimously affirmed (R. 2, 83).

Pertinent evidence adduced at the trial may be summarized as follows:

Government agents, after obtaining knowledge of an illegal still on property known as Indian Hill Farms, proceeded there on the evening of July 30, 1953, to execute a search warrant (R. 3-5, 7-8). The agents observed the still in operation in a farm house, and arrested one defendant (R. 9-11). About two hours later (R. 4, 11), petitioner was driven by another person in an automobile into a lane near the

dwelling house on the farm. An agent identified himself and placed petitioner under arrest (R. 12). At the time of the raid the agents found at the still a large press used to filter mash, a number of 5-gallon cans and caps, an oil burner, and large quantities of sugar (R. 9, 11).

On June 5, 1953, prior to the raid, petitioner and defendant Minkoff (deceased at time of trial) had gone to a New York equipment company to purchase a filter press in the name of a fictitious company. Minkoff paid $700 cash for the filter press (R. 15-17, 20, 21, 67). The seller testified that a photograph of the filter press at the still (Gov. Ex. 6) was "similar to the one [he had] sold" (R. 22, 23). In June and July 1953, Minkoff (not in petitioner's presence) made numerous large scale purchases for cash of 5-gallon cans and caps similar to those found at the site of the still (R. 47, 50-55, 11).

Also prior to the raid, on June 24, 1953, petitioner had purchased, under a fictitious name, at Trenton, New Jersey, a 17-gallon per hour industrial "Nairoil Burner" for $277.44 cash (R. 27-29, 44-45). The seller identified petitioner, and stated that he put the oil burner in petitioner's car at the time of delivery (R. 29, 30). Petitioner made later trips to procure accessories for the oil burner (R. 30-31). When asked whether the photograph of the oil burner discovered at the still (Gov. Ex. 5) was that of the burner he had sold, the seller replied, "It would seem so, * * * it is a large oil burner" (R. 31-32).

ARGUMENT

The sole question presented is the sufficiency of the evidence to support petitioner's conviction of conspiracy to violate the liquor laws. The general inferences deducible from the totality of the evidence summarized in the Statement were sufficient to establish petitioner's participation in the conspiracy. Cf. *Tenore* v. *United States,* 207 F. 2d 565 (C.A. 1); *Butler* v. *United States,* 197 F. 2d 561, 563 (C.A. 10).

The substance of petitioner's argument is that the Court of Appeals should have reversed his conviction since it could have found—as it did in *United States* v. *Gerke,* 125 F. 2d 243 (C.A. 3), certiorari denied, 316 U.S. 667 and *Girgenti* v. *United States,* 81 F. 2d 741 (C.A. 3) [see Pet. 8, 9]—that the evidence against him was equally susceptible to a finding of innocence, as it was of guilt. This is not the proper test to be employed in determining the sufficiency of circumstantial evidence to establish a conspiracy. Here the jury *could* have found beyond a reasonable doubt—under instructions the validity of which petitioner does not challenge—that the circumstantial evidence excluded every reasonable hypothesis but that of guilt. The case was therefore properly submitted to the jury and its decision became final. *Schino* v. *United States,* 209 F. 2d 67, 72 (C.A. 9), certiorari denied, 347 U.S. 937; *Curley* v. *United States,* 160 F. 2d 229, 232-233 (C.A. D.C.), certiorari denied, 331 U.S. 837; *Stoppelli* v. *United States,* 183 F. 2d 391, 393 (C.A. 9), certiorari denied, 340 U.S. 864. Moreover, the function of this Court is not to weigh the evidence, but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict. *United States* v. *Socony-Vac-*

uum Oil Co., 310 U.S. 150, 254; *Abrams* v. *United States,* 250 U.S. 616, 619; *Glasser* v. *United States,* 315 U.S. 60, 80.

In *Holland* v. *United States,* 348 U.S. 121, 139-140, this Court held that refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt, was not error where the jury was properly instructed on the standards for reasonable doubt. This holding is entirely consistent with the proposition for which the court below cites it, *viz.,* "The evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt" (R. 81-82).

United States v. *Falcone,* 311 U.S. 205, upon which petitioner relies, is distinguishable from the instant case. In *Falcone,* this Court held that a mere supplier of materials to an illicit distiller is not guilty of conspiracy, even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge. Here there is no evidence that petitioner engaged in any retail or wholesale trade as a supplier of materials, and no evidence that either petitioner or Minkoff resold the oil burner and filter press to anyone. Rather the jury could draw the reasonable inferences that these items of equipment were used directly by petitioner and the other conspirators in carrying out the purposes of the conspiracy, and that petitioner had knowledge of the conspiracy.

CONCLUSION

The case was decided in accordance with established legal principles, and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1957.

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